SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 867 — [redacted]

CITY OF OREGON,

Respondent

vs.

NORTON S. BUCK,

Petitioner

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Opinions Below	2
Question Presented	2
Statutory Provisions and Ordinance Involved	2–3
Statement of the Case	4
Reasons for Denying This Writ	5
Authority of Municipality to Enact Legislation	5
Ordinance Not in Conflict with State Statute	7
Affidavit Was Sufficient and Legal	7
No Circumvention of Federal Constitution	8
Conclusion	9
APPENDICES:	
Judgment of the Supreme Court of Ohio	10

TABLE OF AUTHORITIES

CASES

	Page
Village of Struthers v. Sokol 108 O.S. 263	7
City of Toledo v. Best 172 Ohio State 671	7
City of Sidney v. Thompson 118 Ohio App. 512	7

CONSTITUTIONS

Art. XVIII, Sec. 3 Ohio Constitution	5

STATUTES and RULES

Ohio Revised Code, 4511.19	5
Ohio Revised Code, 4511.99-B	5

ORDINANCES

Oregon, Ohio Ordinance Section 1-5-8 No. 49	6
Toledo, Ohio Ordinance Section 21-6-9 No. 37-38	6

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully asks this Court to deny the Petitioner's application for a Writ of Certiorari for the reason that there are no substantial constitutional questions involved and that no issues of general public interest have been presented.

OPINIONS BELOW.

There were no oral or written opinions in the Oregon Municipal Court, in the Common Pleas Court of Lucas County, Ohio, in the Sixth District Court of Appeals of Lucas County, Ohio, or in the Supreme Court of the State of Ohio.

QUESTION PRESENTED.

Whether the City of Oregon, Ohio, has the power and jurisdiction to create, define, and prohibit *ab initio* an alleged motor vehicle crime by ordinance, and thereafter to try, convict and sentence an accused thereunder, contrary to and in violation of the express prohibitions and provisions of the Ohio Revised Code Sections 4511.06, 4511.07, 4511.19 and 4511.99 (B) which revoke all power and jurisdiction theretofore delegated to municipalities to define, prohibit and punish motor vehicle crimes by ordinance.

STATUTORY PROVISIONS AND ORDINANCE INVOLVED.

The statutory provisions involved are Sections 4511.19 and 4511.99 (B) of the Ohio Revised Code, and they provide as follows:

R.C. 4511.19 Operation of Vehicle while under influence of alcohol or drugs

"No person who is under the influence of intoxicating liquor, narcotic drugs, or opiates shall operate any vehicle, streetcar, or trackless trolley within this state."

R.C. 4511.99 Penalties

"(B) Whoever violates Section 4511.19 of the Revised Code shall be fined not more than five hundred dollars and imprisoned in the county jail or workhouse not less than three days nor more than six months and no court shall suspend the first three days of any sentence provided for under this section."

The ordinance involved in City of Oregon, Ohio, Ordinance Section 1-5-8 No. 49, and it provides as follows:

Section 1-5-8 Oregon Ordinance No. 49, Operation of Vehicles while intoxicated; Penalty

"(A) No person who is under the influence of intoxicating liquor or narcotic drugs, or opiates shall operate or be in actual physical control of any vehicle, streetcar or trackless trolley within this city.

"(B) Every person who is convicted of a violation of this section, shall be punished by a fine of not more than Five Hundred Dollars or imprisonment in the county or municipal jail for not more than six months or both such fine and imprisonment."

STATEMENT OF THE CASE.

The petitioner was arrested, tried, and convicted of operating a motor vehicle while under the influence of intoxicating liquor under an affidavit issued under City of Oregon, Ohio, Ordinance Section 1-5-8 No. 49. Trial by jury resulted in a verdict of guilty. Petitioner was thereupon sentenced to three days in jail, and to pay fine of $150.00 and costs. On successive appeals to the Common Pleas Court of Lucas County, Ohio, and to the Court of Appeals of Lucas County, Ohio, said Appellate Courts affirmed the verdict, sentence and judgment of the Oregon Municipal Court. On memorandum in support of jurisdiction of the Supreme Court of Ohio on appeal from the Court of Appeals of Lucas County, Ohio, said Supreme Court of Ohio dismissed the motion to certify and dismissed the appeal as of right thereby affirming the judgments of the lower Courts. There were no oral or written opinions rendered by any of the foregoing Courts.

REASONS FOR DENYING THIS WRIT.

1. The authority for a municipality to enact legislation of this type is governed by Article XVIII, Section 3 of the Ohio Constitution, which provides as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

It will be seen from the above constitutional provisions that the only restrictions placed upon the municipality is that its ordinance must not be "in conflict" with the general law.

2. The City of Oregon Ordinance is not "in conflict" with the general laws of the State of Ohio, because it does not prescribe a penalty more severe than that which is set out in the State Statutes.

Section 4511.19 and 4511.99 (B) of the Ohio Revised Code reads as follows:

R.C. 4511.19 Operation of Vehicle while under influence or alcohol or drugs

"No person who is under the influence of intoxnarcotic drugs, or opiates shall operate any vehicle, streetcar, or trackless trolley within this state."

R.C. 4511.99 Penalties

"(B) Whoever violates section 4511.19 of the Revised Code shall be fined not more than five hundred dollars and imprisoned in the county jail or workhouse not less than three days nor more than six months and no Court shall suspend the first three days of any sentence provided for under this section."

Section 1-5-8 of Ordinance 49, City of Oregon, Ohio reads as follows:

Section 1-5-8 Oregon Ordinance No. 49, Operation of Vehicles while intoxicated; Penalty

"(A) No person who is under the influence of intoxicating liquor or narcotic drugs, or opiates shall operate or be in actual physical control of any vehicle, streetcar or trackless trolley within the city.

"(B) Every person who is convicted of a violation of this section, shall be punished by a fine of not more than Five Hundred Dollars or imprisonment in the county or municipal jail for not more than six months, or both such fine and imprisonment."

Section 21-6-9 of Ordinance 37-38, City of Toledo, Ohio, reads as follows:

Section 21-6-9 Operation of vehicles while intoxicated; Penalty

"(A) No person who is under the influence of intoxicating liquor or narcotic drugs, or opiates shall operate or be in actual physical control of any vehicle, street car or trackless trolley within this city.

"(B) Every person who is convicted of a violation of this section shall be punished by a fine of not more than Five Hundred Dollars or imprisonment in the county or municipal jail for not more than six months, or both such fine and imprisonment."

In the case at bar, the Petitioner is attempting to show "a conflict" between the enacted ordinances of municipalities and the State Statute, because the penalty provisions are not similar and because the phrase "physical control" is included in the ordinances.

In *Village of Struthers v. Sokol, 108 Ohio State 263,* the Court stated in paragraph 3 of the syllabus:

> "3. A police ordinance is not in conflict with the general law upon the same subject merely because certain specific actions are declared unlawful by the ordinance which actions are not referred to in the general law. . . . ."

In the *City of Toledo vs. Best, 172 Ohio State 671,* the Ohio Supreme Court held that difference in penalty did not amount to "conflict" so long as the degree of offense (misdemeanor or felony) was the same. This case also involved an ordinance which included the offense of physical control and the Court did not see fit to invalidate the ordinance on such grounds.

In *City of Sidney v. Thompson, 118 Ohio App. 512,* the Court noted in paragraph one of the syllabus as follows:

> "1. A municipal ordinance making it an offense to 'operate or be in actual physical control' of a vehicle while under the influence of intoxicating liquor . . . is not in conflict with Section 4511.19 of the Revised Code which excludes physical control as a possible statutory offense."

The Respondent contends that the cases recited above clearly indicate that there is no conflict between the ordinance and the statute. The City Ordinance of Toledo, Ohio, was inserted herein to show that it is exactly the same ordinance, word for word, as is the ordinance of the City of Oregon, and both cities are contiguous to each other in Ohio. The City of Toledo ordinance has been approved by the Supreme Court of Ohio on more than one occasion.

3. The affidavit upon which a warrant for arrest was issued must have been proper and valid, because the Petitioner did not raise this as one of the issues on his appeal

to the Supreme Court of Ohio. The Petitioner presented four questions for review, but the complaint about the "affidavit" was not one of them. It is an elementary rule of jurisprudence that a reviewing Court will not pass upon errors of law which were not presented for appraisal by the Appellate Courts of inferior jurisdiction.

4. There must not have been any noticeable "Circumvention of Federal Constitution," since the Petitioner fails to recite any specific instance of same, and also fails to give this Court any authority to support such a statement.

CONCLUSION

It is the position of Respondent that the Supreme Court of the United States is without jurisdiction to hear the appeal for the following reasons:

1. No federal questions whatsoever were involved in the determination of the cause by the Supreme Court of Ohio.

2. The ordinance as construed by the state Courts, trial and appellate was shown not to be in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. Questions which are presented to this Court have not been reviewed by the Appellate Courts of inferior jurisdiction.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,
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Attorney for Respondent

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APPENDIX A

JUDGMENTS OF THE SUPREME COURT OF OHIO.

This cause here as an appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Oregon Municipal Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

Judgment of the Supreme Court of Ohio
On Motion to Certify Entered June 15, 1966

It is ordered by this Court that this motion is overruled.

Judgment of the Supreme Court of Ohio on
Rehearing Entered July 10, 1966

It is ordered by the Court that rehearing in this case is denied.